PRODUCTS LIABILITY—THE TEST OF CONSUMER EXPECTATION FOR "NATURAL" DEFECTS IN FOOD PRODUCTS

In virtually every American jurisdiction, a plaintiff may recover damages for physical injuries received from the consumption of a food product containing a deleterious foreign object or substance. Assume, for example, that a consumer is seriously injured by swallowing small pieces of broken glass in a chicken pot pie. A consumer injured by an object so manifestly foreign to a food product generally may recover damages from the defendant manufacturer, seller, or restaurateur for negligence or breach of implied warranty, or under a strict liability theory.[1] Consider, however, the plight of a consumer injured not by glass particles, but by tiny, sharp fragments of chicken bone buried in the chicken pot pie. Can the consumer recover damages in such a case, when the injurious substance is not necessarily foreign to the ingredients of the food product? That is the question with which this Note is concerned.

There is a split of authority over which of two widely used tests should be applied in these cases. For many years, liability was commonly denied as a matter of law whenever the deleterious substance in a food product was determined to be "natural," not "foreign," to the product's ingredients.[2] A few states, however, rejected the foreign-natural distinction as the controlling test and held that food processors could be liable for damages if the injurious natural substance was one that a consumer would not customarily expect to find in a particular food product.[3] The latter standard, often called the "reasonable expectation" or "consumer expectation" test, has recently been adopted in several jurisdictions.[4]

In Ohio, the applicable standard of liability for "natural" defects

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[1] *E.g.*, Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936) (ground glass in chow mein); Gannon v. S.S. Kresge Co., 114 Conn. 36, 157 A. 541 (1931) (glass particle in sandwich); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421, *writ denied*, 248 La. 469, 179 So. 2d 641 (1965) (recognizing rule); Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935) (rat excrement in liver pudding).

[2] *E.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936); Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (1944); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941).

[3] *E.g.*, Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Lore v. DeSimone Bros., 12 Misc. 2d 174, 172 N.Y.S.2d 829 (Sup. Ct. 1958); Wood v. Waldorf System, Inc., 79 R.I. 1, 83 A.2d 90 (1951).

[4] *E.g.*, Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974); Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. 1967); Stark v. Chock Full O'Nuts, 77 Misc. 2d 553, 356 N.Y.S.2d 403 (Sup. Ct. 1974).

in food is uncertain. The only significant pronouncement on the subject was made by the Supreme Court of Ohio in a 1960 decision, *Allen v. Grafton*,[5] in which the court perplexingly vacillated between the naturalness and expectation tests before it ultimately denied recovery to the plaintiff as a matter of law. The *Allen* decision and its significance to food products liability in Ohio are discussed in section II of this Note.

This Note will examine the food products liability cases in which injury is caused by a deleterious natural object or substance contained in an otherwise acceptable food product. It will discuss the development of the foreign-natural and reasonable expectation tests, the merits of each, and the current trend toward adoption of the expectation test. Finally, in light of the conspicuous ambiguity of Ohio law on the subject, this Note shall present the argument that Ohio should align itself more resolutely with those states that have adopted the reasonable expectation approach.

I. THE DEVELOPMENT OF THE FOREIGN-NATURAL AND REASONABLE EXPECTATION TESTS

Liability for physical injury caused by a harmful substance contained in a food product is usually predicated upon one or more of three theories of recovery.[6] In all jurisdictions, negligence is an available theory when a food processor violates its duty of care by including in its product a deleterious substance or object unknown to the consumer.[7] Most states also recognize an action for breach of implied warranty of merchantability—generally meaning "fitness for human consumption" in the case of food products[8]—which is a hybrid of contract and tort theories. The warranty action can normally be maintained against processors,[9] retail sellers,[10] and restaurateurs.[11]

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[5] 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[6] In addition to the three grounds for recovery mentioned in the text, other possible grounds are deceit, misrepresentation, and false advertising. For an excellent analysis comparing the various theories for recovery in products liability cases in general, see E. SWARTZ, HAZARDOUS PRODUCTS LITIGATION 47-83 (1973).

[7] *E.g.*, Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Lore v. DeSimone Bros., 12 Misc. 2d 174, 172 N.Y.S.2d 829 (Sup. Ct. 1958); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

In several states, violation of state pure food and drug laws constitutes negligence per se. *See, e.g.*, Meshbesher v. Channallene Oil & Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909); Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458, 154 N.E. 309 (1926); Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[8] *E.g.*, Lore v. DeSimone Bros., 12 Misc. 2d 174, 172 N.Y.S.2d 829 (Sup. Ct. 1958); Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E.2d 734 (1938); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942).

[9] Johnson v. Stoddard, 310 Mass. 232, 37 N.E.2d 505 (1941); Bonenberger v. Pittsburgh Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942).

The third theory of recovery, available in a few states, is strict liability in tort.[12]

As indicated above, most courts have little difficulty in holding a food processor or seller liable upon at least one of these theories for an injury caused by a food item containing "foreign" objects, such as nails, stones, insects, and glass particles. But courts are divided on whether liability may be incurred for an injury resulting from objects which are "natural" to an ingredient in the product, such as bones, nut shells, and fruit pits or seeds. In states where the foreign-natural test is applied, even if an injured plaintiff can establish an otherwise legally sufficient claim of negligence, breach of implied warranty, or strict tort liability, a food processor may be free from liability as a matter of law if the deleterious object or substance in the food is one "natural" to the ingredients of the product,[13] as in the example of the chicken bone in the chicken pot pie. However, in states where the reasonable expectation test is the rule, liability might be incurred on any appropriate theory even for a "natural" defect if it is one not reasonably anticipated by the consumer. Thus the question of whether the foreign-natural test or the reasonable expectation test should apply in a particular jurisdiction is significant regardless of the theory upon which a right to recover is claimed.[14]

A. *Origins of the Naturalness Test—The* Mix *Doctrine*

The premier discussion of the "natural defect" problem was provided in *Mix v. Ingersoll Candy Co.*,[15] in which the California Supreme Court held that a chicken pie containing a chicken bone which had injured the plaintiff was not unfit for human consumption. The plaintiff in *Mix* had purchased the chicken pie in a restaurant operated by the defendant corporation. The recovery of damages sought was grounded upon two theories: negligence and breach of an implied warranty of fitness. While the court clearly acknowledged that a restaurant operator could be held liable for serving food not

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[10] Ward v. Great Atl. & Pac. Tea Co., 231 Mass. 90, 120 N.E. 225 (1918); Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E.2d 734 (1938); Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945).

[11] Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936); Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465 (1936); Eisenbach v. Gimbel Bros., Inc., 281 N.Y. 474, 24 N.E.2d 131 (1939); Yochem v. Gloria, Inc., 134 Ohio St. 427, 17 N.E.2d 731 (1938).

[12] Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974). *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[13] *E.g.*, cases cited note 2 *supra*.

[14] *See* Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. 1967); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

[15] 6 Cal. 2d 674, 59 P.2d 144 (1936).

"reasonably fit" for eating, it affirmed the defendant's demurrer on both counts in the belief that the chicken pie was not made unfit by the presence of a chicken bone.

The *Mix* decision is generally cited for the proposition that liability must be denied as a matter of law when the injurious substance in the food product is natural to the food itself. While such an interpretation is not totally inaccurate, it oversimplifies the underlying basis of the court's opinion. The court began its analysis by noting that all of the previous cases it had examined involved injuries caused by manifestly foreign objects. No precedent could be found for extending implied warranty liability to cover the presence of bones natural to a meat product. The plaintiff contended that the trial court could properly hold as a matter of law that the chicken pie was not unfit for consumption only if the court could take judicial notice that chicken pies *usually* contain chicken bones. The court, however, found it necessary to hold only that, as a matter of common knowledge, chicken pies *occasionally* contain chicken bones.[16] Thus the court at times did focus upon the consumer's expectations as well as upon the naturalness of the defect.

Did the *Mix* court deny recovery because chicken bones are natural to the ingredients of chicken pie or because a consumer customarily expects to find an occasional bone in chicken pie? The court stated that a deviation from perfection in the quality of a food product does not necessarily render the food unfit for consumption, "particularly if it is of such a nature as in common knowledge could be *reasonably anticipated* and guarded against by the consumer."[17] This language suggests that liability may be found when the natural defect is one not reasonably anticipated by the consumer. Another part of the opinion, however, implies that liability should be denied in all cases involving natural defects,[18] perhaps on the dubious assumption that all natural defects are in fact anticipated by consumers. Thus the court appears to have based its decision upon both the element of naturalness and the expectations of the consumer: "Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones."[19]

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[16] *Id.* at 682, 59 P.2d at 148.

[17] *Id.* at 681, 59 P.2d at 147-48 (emphasis added).

[18] *Id.* at 682, 59 P.2d at 148. This conclusion is supported by the court's decision in Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936), in which the plaintiff, a patron of the defendant restaurant, recovered damages for injuries sustained from consuming ground glass in a chow mein dinner. The fact that *Goetten* was decided on the same day as *Mix* emphasizes the distinction drawn by the court between natural and foreign defects.

[19] 6 Cal. 2d at 682, 59 P.2d at 148.

Despite its ambiguity on this point, the *Mix* decision has been widely embraced as the leading case on the subject of natural defects and as authority for the denial of liability where the injurious substance is natural to the product's ingredients. Following the *Mix* doctrine, the Iowa Supreme Court in *Brown v. Nebiker*[20] affirmed a directed verdict for the defendant restaurant in a case in which death had resulted from the ingestion of a bone sliver in a pork chop. Similarly, an Illinois appellate court denied recovery in *Goodwin v. Country Club*,[21] in which the plaintiff's deceased had swallowed a bone contained in creamed chicken served by the defendant country club. Other courts also adopted the *Mix* foreign-natural test.[22]

Mix and its progeny did not escape the criticism of commentators.[23] Professor Reed Dickerson remarked that "[i]nsofar as these cases rest on the notion of 'naturalness' in the sense that nothing that is an inherent part of the raw product itself can be a legal defect, they do not hold water."[24] Dickerson and others believed that the foreign-natural distinction provided a confusing and often misleading basis for decision. Because of this confusion, the *Mix* rationale was taken to its logical extreme by a California court in *Silva v. F.W. Woolworth Co.*[25] The plaintiff in *Silva* was denied recovery as a matter of law for an injury received from swallowing a turkey bone. The bone had been hidden in the dressing served with the defendant restaurant's roast turkey dinner. Because it decided to "look upon the service as one dish as delivered, in which there was no substance not 'natural to the type of meat served,"[26] the court adopted a standard which apparently would give judgment for a defendant whenever an injurious object is natural to any food item served on a plate.

One case in which the plaintiff did recover under the *Mix* doctrine was *Arnaud's Restaurant, Inc. v. Cotter*.[27] He had sustained injury from eating a piece of crab shell in a seafood dish in which crab meat was not an ingredient. The Fifth Circuit Court of Appeals affirmed the defendant restaurant's liability on an implied warranty

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[20] 229 Iowa 1223, 296 N.W. 366 (1941).

[21] 323 Ill. App. 1, 54 N.E.2d 612 (1944).

[22] *E.g.*, Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949) (bone in barbecue pork sandwich). *Cf.* Courter v. Dilbert Bros., Inc., 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. 1958) (prune pit in jar of prune butter) (possibly dictum).

[23] R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 183-90 (1951); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. REV. 281 (1961); Schag, *Consumer Expectation—The Test of a Substance Natural to a Food as a Legal Defect*, 15 FOOD DRUG COSM. L.J. 311 (1960).

[24] R. DICKERSON, *supra* note 23, at 185.

[25] 28 Cal. App. 2d 649, 83 P.2d 76 (Ct. App. 1938).

[26] *Id.* at 651, 83 P.2d at 77.

[27] 212 F.2d 883 (5th Cir. 1954).

theory, arguing that the crab shell was "foreign" to the seafood meal because it contained no crab meat. But under the same rationale, it appears that if the meal had contained crab meat, or if the injurious shell had been of the variety "natural" to the seafood used in the dish, a recovery would have been denied.

B. *Efforts to Circumvent the* Mix *Doctrine—Emergence of the Expectation Test*

Under the *Mix* formulation of the foreign-natural test, a food processor or seller could not be held liable for injuries caused by a substance indigenous to any ingredient in a product. A few courts, in attempting to avoid the arbitrariness of such a rule, went beyond the common meaning of the *Mix* foreign-natural distinction. These courts reasoned that, even though a deleterious substance is natural to an ingredient in a product, the substance may still be considered foreign to the product in the form sold to the consumer. For example, in *Bryer v. Rath Packing Co.*[28] the plaintiff sued for the defendant's negligence in packing cans of "Ready to Serve Boned Chicken" used by a school cafeteria in preparing chicken chow mein. A small chicken bone concealed in the chow mein had lodged in the esophagus of a young student. The appellate court in *Bryer* considered the issue in the case to be "whether bones which are natural to the type of food eaten but which generally are not found in the *style of the food as prepared* are to be deemed the *equivalent of a foreign substance* in determining whether the food in which they are is reasonably fit and safe for human consumption."[29] The court answered in the affirmative, reversing the trial court's judgment for the defendant, and held that the issue was properly one for the jury to decide. A similar approach was employed by a New York trial court in *Lore v. DeSimone Brothers.*[30] The plaintiff in that case sued a retailer and a manufacturer for personal injuries sustained from eating a piece of sausage containing a sharp bone fragment. Although the plaintiff failed to prove the defendants' negligence, the trial court held the retailer liable for a breach of implied warranty, finding that the bone fragment was not natural to the meat product in its processed state, and that a consumer would not anticipate the presence of such a defect. In *Wood v. Waldorf System, Inc.*,[31] a chicken bone in a chicken soup product had lodged in the plaintiff's throat, resulting in

[28] 221 Md. 105, 156 A.2d 442 (1959).
[29] *Id.* at 108, 156 A.2d at 444 (emphasis added).
[30] 12 Misc. 2d 174, 172 N.Y.S.2d §29 (Sup. Ct. 1958).
[31] 79 R.I. 1, 83 A.2d 90 (1951).

an award of damages for the manufacturer's negligence. In response to the defendant's arguments that liability could not be imposed when the injury was caused by such natural objects as bones, the court said:

> Assuming that chicken bones are natural to and are used in the preparation of such soup, we do not think that it is necessary, natural or customary that harmful bones be allowed to remain concealed in this type of soup as finally dispensed to a customer so as to relieve the purveyor of such food of all responsibility. In our judgment, the question is not whether the substance may have been natural or proper at some time in the early stages of preparation of this kind of soup, but whether the presence of such substance, if it is harmful and makes the food unfit for human consumption, is natural and ordinarily expected to be in the final product which is impliedly represented as fit for human consumption.[32]

Thus the court in *Wood* also viewed the defect as one essentially foreign to the food product in the style or condition in which it was sold to the plaintiff.

The *Bryer*, *Lore*, and *Wood* decisions demonstrate the propensity of a few courts in the 1950's to focus upon the state of the food product as sold or served, rather than merely upon the ingredients of the product, to determine whether the defect was natural or foreign to the food. In doing so, these courts were in effect distinguishing between raw or unprocessed foods, in which bones and seeds might still properly be considered natural flaws, and processed foods in which bones and seeds would ordinarily be considered foreign to the finished product. Such a distinction must be one of degree, and inevitably must take into consideration the ordinary expectations of the consumer. Professor Dickerson recognized this in 1951, and advocated the abandonment altogether of the foreign-natural terminology in favor of a reasonable expectation rationale:

> The better test of what is legally defective appears to be what consumers customarily expect and guard against. Canned foods are expected to be found already washed, cleaned, and trimmed, while the same foods in fresh form normally call for work of that sort by the consumer.[33]

Another writer, commenting upon the reasonable expectation approach, predicted:

> While different jurisdictions may vary as to what the expectation

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[32] *Id.* at 6, 83 A.2d at 93.

[33] R. DICKERSON, *supra* note 23, at 185.

> may be in a particular situation, the increased utilization of this approach will, by eliminating preoccupation with "natural" [*sic*] as a test in itself, help formulate a more rational and consistent basis for judicial decision.[34]

It was an accurate prediction because, following the appearance of this alternative rationale in the Dickerson treatise and elsewhere, the *Mix* approach was eventually abandoned by several courts in favor of the more flexible expectation test.[35]

II. THE CONSUMER EXPECTATION TEST IN OHIO

A. *Allen v. Grafton*

It was in the context of this debate about the foreign-natural and reasonable expectation tests that the Supreme Court of Ohio first examined the question in 1960. The supreme court had previously sanctioned recovery for an injury caused by a foreign substance in food,[36] but before its decision in *Allen v. Grafton*[37] the court had never expressly considered the appropriateness of relief for injuries caused by natural defects. The plaintiff in *Allen* alleged that he had swallowed a three-by-two centimeter piece of oyster shell embedded in fried oysters served by the defendant restaurant. Damages were sought for abdominal injuries on theories of negligence and breach of implied warranty of fitness. The trial court's decision to sustain the defendant's demurrer was reversed by the Court of Appeals for Hamilton County. The Supreme Court of Ohio then reversed the appellate court and affirmed the trial court's judgment for the defendant.

The supreme court acknowledged in *Allen* that a restaurant impliedly warrants its food to be reasonably fit for consumption, and that violation of the Ohio Pure Food and Drug Act prohibiting the sale of "adulterated" food[38] constitutes negligence per se.[39] However, in a four-to-three decision the court held as a matter of law that the presence of a single piece of oyster shell in a serving of six fried oysters did not justify a legal conclusion that the food was rendered

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[34] Schag, *supra* note 23, at 319. *See also* Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 592 (1967).

[35] *E.g.*, Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. 1967); Stark v. Chock Full O'Nuts, 77 Misc. 2d 553, 356 N.Y.S.2d 403 (Sup. Ct. 1974); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

[36] *E.g.*, Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935).

[37] 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[38] OHIO REV. CODE ANN. § 3715.52 (Page 1971) prohibits the manufacture, sale, delivery, holding or offering for sale of any food that is "adulterated."

[39] 170 Ohio St. at 251, 164 N.E.2d at 170.

either "adulterated"[40] or "unfit for consumption."

The majority opinion is puzzling because the grounds for decision are only vaguely explained. Attesting to its ambiguity is the absence of any articulated underlying legal basis in the court's syllabus.[41] The opinion begins with an exhaustive survey of food products liability cases from other jurisdictions, noting especially the *Mix* line of cases wherein liability had been summarily denied. But, as if it preferred to eschew the cases in which naturalness of the defect was determinative of liability, the court remarked that it was inclined to agree with Professor Dickerson's criticism of the naturalness test and his suggestion that the better test was one of consumer expectation.[42] Thus the "foreign-natural" distinction was seemingly rejected as the controlling test:

> In the instant case, it is not necessary to hold, as some of the . . . cases do, that, because an oyster shell is natural to an oyster and thus not a substance "foreign" to an oyster, no liability can be predicated upon the sale of a fried oyster containing a piece of oyster shell.[43]

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[40] Food is "adulterated" under OHIO REV. CODE ANN. § 3715.59(A) (Page 1971) if:

> It bears or contains any poisonous or deleterious substance which may render it injurious to health; *but in case the substance is not an added substance*, such food shall not be considered adulterated if the *quantity* of such substance in such food does not ordinarily render it injurious to health [emphasis added].

As to the last clause of the statute, the court in *Allen* concluded that a *single piece* of shell in a serving of fried oysters "does not ordinarily render it injurious to health," despite the fact that the plaintiff in the case before the court had alleged an actual injury. However, the court said:

> A different problem would be presented if the shell had been shattered into smaller pieces which could not be readily removed from the oyster so as to leave any substantial edible portion that was free from such pieces. In the latter instance, a contention, that the oyster would constitute "adulterated" food or food not reasonably fit for eating, might be more persuasive.

170 Ohio St. at 252, 164 N.E.2d at 170.

Cf. Fouke & Reynolds v. Great Lakes Co., 33 Ohio App. 2d 273, 294 N.E.2d 245 (1972), in which an Ohio appellate court concluded that mercury consumed by fish in their natural habitat is not an "added substance" within the meaning of § 3715.59(A), and that evidence in the case was insufficient to prove that the *quantity* of mercury in the fish ordinarily rendered the fish injurious to health. The fish therefore were held not to be adulterated. *Cf. also* United States v. 1232 Cases American Beauty Brand Oysters, 43 F. Supp. 749 (W.D. Mo. 1942). In interpreting a clause in the definition of adulterated food in 21 U.S.C.A. § 342(a)(1) (1972) that was identical to the Ohio definition, the district court held that the government could not condemn certain cases of oysters containing shell fragments because the quantity of fragments did not render the oysters injurious to health.

[41] As to decisions of the Supreme Court of Ohio, only the pronouncements of law set out in the syllabus (or in per curiam opinions) are given precedential effect. State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[42] 170 Ohio St. at 258, 164 N.E.2d at 174.

[43] *Id.*

Instead the court in *Allen* appeared to be basing its decision for the defendant upon a "reasonable expectation" test:

> In our opinion, the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone that we can say *as a matter of law* that one who eats oysters can *reasonably anticipate and guard against* eating such a piece of shell, especially where it is as big as the one described in plaintiff's petition.[44]

While the naturalness of the defect was not the only determining factor in *Allen*, it was nevertheless a crucial consideration in the application of the expectation test:

> [T]he fact, that something that is served with food and that will cause harm if eaten is natural to that food and so not a "foreign substance," will usually be an important factor in determining whether a consumer can reasonably anticipate and guard against it.[45]

Predictably, the *Allen* decision has received different interpretations. It has been cited by a few courts as authority for the foreign-natural test,[46] and by others for the reasonable expectation test.[47] Commentators also disagree.[48] In Ohio, there has yet to be any subsequent clarification of the decision by the supreme court, and few Ohio lower courts have treated the subject in the sixteen years since *Allen*. The first relevant case in Ohio citing the *Allen* decision, *Hecht v. Giunta's Stop & Shop Market*,[49] involved a consumer who had sustained dental injuries by biting down upon a peppercorn in the defendant's salami. In granting judgment for the plaintiff, the trial court held that if a food processor includes within a product a hazard known or constructively known to the processor, but unanticipated by the consumer, and if the hazard is not brought to the attention of the consumer, the processor and the seller are liable for resulting injuries.[50] The court rested its decision upon its view that the con-

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[44] *Id.* at 259, 164 N.E.2d at 174-75 (emphasis added).

[45] *Id.* at 258-59, 164 N.E.2d at 174.

[46] Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421, *writ denied*, 248 La. 468, 179 So. 2d 641 (1965).

[47] Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). *Cf.* Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964).

[48] *Allen* is interpreted as a "foreign-natural" case in King, *Commercial Law*, 36 N.Y.U.L. REV. 261, 265 (1961), but interpreted as a "reasonable expectation" case in Freedman, *Allergy and Products Liability Today*, 24 OHIO ST. L.J. 479, 492 (1963); Schag, *supra* note 23, at 316.

[49] 40 Ohio Misc. 6, 317 N.E.2d 269 (Shaker Heights Mun. Ct. 1974).

[50] The typical "foreign-natural" problem is turned on its head in a case like *Hecht*. In the cases previously discussed, the deleterious objects were often natural to an ingredient of the product, but foreign to the product itself as sold to consumers. In *Hecht*, the reverse was true—peppercorns are not natural to meat, but arguably are natural to a finished salami product.

sumer expectation approach was adopted by the supreme court in *Allen*.

B. *Consumer Expectation: A Question of Law or Fact?*

To some extent, the uncertainty associated with the *Allen* decision may be attributed to the fact that the court held *as a matter of law* that a plaintiff-consumer could reasonably anticipate finding an oyster shell in a serving of fried oysters. In most cases it would seem that the reasonable expectations of consumers would be factual matters reserved for the jury. In other words, a consumer's expectation as to the likelihood of encountering a particular type of deleterious object or substance in a food product would seldom be so obvious to the court that it could decide the question as a matter of law. As the dissenting opinion argued in *Allen*, "reasonable minds could find that a shell fragment of the size alleged in the petition was not a reasonably expected defect, and that therefore the food served was not reasonably fit for human consumption."[51] The Pennsylvania Supreme Court reached the same conclusion in *Bonenberger v. Pittsburgh Mercantile Co.*,[52] which involved an oyster shell in a can of oysters. The plaintiff in *Bonenberger* sued the retail seller of the oysters on an implied warranty theory, and the trial judge directed a verdict for the defendant. The supreme court reversed, holding that the issue of whether the oysters were "reasonably fit" was one for the jury.

By upholding the trial court's determination of the consumer expectation issue as a matter of law without saying much more, the supreme court in *Allen* left uncertain the circumstances in which the issue should go to the jury, or whether it should ever go to the jury. One Ohio appellate court recently ordered the trial court to submit the issue to the jury in *Thompson v. Lawson Milk Co.*[53] The plaintiff had allegedly broken a tooth on small, hard objects, apparently bone or cartilage, contained in the defendant's chopped ham. The trial court granted the defendant's motion for a directed verdict on the basis of *Allen*, holding as a matter of law that a consumer should reasonably expect such natural defects in meat products. The Court of Appeals for Franklin County reversed, stating that the *Allen* test of consumer expectation was an issue for the jury to consider, not strictly a matter of law.

The appellate court in *Thompson* wisely chose to construe the *Allen* decision narrowly, limiting the latter case's determination that

[51] 170 Ohio St. at 260, 164 N.E.2d at 175 (Matthias, J., dissenting).

[52] 345 Pa. 559, 28 A.2d 913 (1942).

[53] 48 Ohio App. 2d 143, 356 N.E.2d 309 (1976).

the trial judge may decide the issue of consumer expectation to the particular facts and circumstances of that case. It may sometimes be proper for a trial judge to judicially notice that a specific natural defect may be found on occasion in a specific food product, and that the occurrence of such a defect is a matter of common knowledge in the community.[54] When it is indisputable that reasonable persons customarily expect to find such specific imperfections in their food, a court may decide the issue as a matter of law. In most instances, however, when reasonable minds could disagree about the reasonable expectations of consumers, a factual question is presented for the deliberation of the jury.

III. Recent Developments

The recent trend among several states has been toward acceptance of the reasonable expectation test. Where the test is applied, the issue of consumer expectation is typically reserved for the jury. For example, four months after *Allen v. Grafton*[55] was decided in Ohio, the Wisconsin Supreme Court held in *Betehia v. Cape Cod Corp.*[56] that an action for negligence and breach of implied warranty could be maintained against a restaurant by a patron who swallowed a chicken bone contained in a chicken sandwich. Criticizing the strict foreign-natural distinction applied in the California decision of *Mix v. Ingersoll Candy Co.*,[57] the *Betehia* court said:

> This reasoning is fallacious because it assumes that all substances which are natural to the food in one stage or another of preparation are, in fact, anticipated by the average consumer in the final product served. . . . Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served.[58]

The proper test, the court held,

> should be what is reasonably expected by the consumer in the food as served. . . . What is to be reasonably expected by the consumer is a *jury question in most cases*; at least, we cannot say as a matter of law that a patron of a restaurant must expect a bone in a chicken sandwich either because chicken bones are occasionally found there or are natural to chicken.[59]

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[54] *See, e.g.*, Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 682, 59 P.2d 144, 148 (1936).
[55] 170 Ohio St. 249, 164 N.E.2d 167 (1960).
[56] 10 Wis. 2d 323, 103 N.W.2d 64 (1960).
[57] 6 Cal. 2d 674, 59 P.2d 144 (1936).
[58] 10 Wis. 2d at 328, 103 N.W.2d at 67.
[59] *Id.* at 332, 103 N.W.2d at 69 (emphasis added).

In *Zabner v. Howard Johnson's, Inc.*,[60] the plaintiff sued on both negligence and implied warranty theories for an injury to her teeth and gums caused by biting down on a walnut shell in the defendant's maple walnut ice cream. Applying a strict application of the naturalness test, the trial court granted a summary judgment for the defendant. The Florida appellate court reversed, holding that the proper standard in that state was the reasonable expectation test. Consumer expectation, said the court, should be a jury question in most cases. A similar result was reached in *Hochberg v. O'Donnell's Restaurant, Inc.*,[61] in which the plaintiff brought suit for negligence and breach of implied warranty after biting into the pit of an olive served in a cocktail by the defendant restaurant. The trial court directed a verdict for the defendant on the implied warranty theory because the olive pit was a natural part of the food in which it was found. The appellate court reversed, stating:

> In our view it is unrealistic to deny recovery *as a matter of law* if, for example, a person is injured from a chicken bone while eating a sliced chicken sandwich in a restaurant, simply because the bone is natural to chicken. The exposure to injury is not much different than if a sliver of glass were there. . . . It is a different matter if one is injured by a bone while eating a chicken leg or a steak or a whole baked fish. There, it may well be held as a matter of law that the consumer should reasonably expect to find a bone.
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> . . . .
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> We think the question of what appellant was reasonably justified in expecting was properly a jury question here.[62]

Of course, some of the states that previously had applied the foreign-natural test still adhere to it. California, for example, the state generally credited with originating this test in the *Mix* decision, apparently still follows its own precedent, summarily denying liability in cases involving deleterious defects natural to the food product's ingredients.[63]

Other courts have often had great difficulty in formulating a sensible rationale for denying a food processor's liability. One interesting Massachusetts case, *Webster v. Blue Ship Tea Room, Inc.*,[64] held that the presence of fish bones in fish chowder did not constitute a breach of implied warranty. After framing the issue in the case as

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[60] 201 So. 2d 824 (Fla. 1967).

[61] 272 A.2d 846 (D.C. Mun. Ct. App. 1971).

[62] *Id.* at 849 (emphasis in original).

[63] Maiss v. Hatch, 8 Cal. Rptr. 351 (Super. Ct. 1960) (bone in hamburger).

[64] 347 Mass. 421, 198 N.E.2d 309 (1964). The court's opinion is entertaining in its zealous digression into the history of chowder, complete with recitation of several New England recipes.

whether a fish bone was a foreign substance making the chowder unwholesome or unfit to eat, the court finally relieved the defendant restaurant of any liability on what appeared to be a reasonable expectation rationale, concluding: "We should be prepared to cope with the hazards of fish bones, the occasional presence of which in chowders is, it seems to us, to be anticipated, and which, in the light of a hallowed tradition, do not impair their fitness or merchantability."[65] Consider also the 1966 Oregon case of *Hunt v. Ferguson-Paulus Enterprises*,[66] in which the plaintiff sought damages for dental injuries sustained from a cherry pit hidden in the defendant's cherry pie. The Oregon Supreme Court affirmed a judgment for the defendant vending machine owner. After discussing both the foreign-natural and reasonable expectation tests, the court declined to decide which standard should apply in that state. Unable even to ascertain what test had been applied by the trial court, the supreme court resigned itself to the conclusion of the trial judge that the matter was a "mixed question of law and fact."[67]

In New York, the courts have been at variance in determining liability for natural defects in foods. An appellate court in *Woods v. Cabash Restaurant, Inc.*[68] held as a matter of law that the presence of a turkey bone in an open turkey sandwich did not constitute either negligence or breach of implied warranty by the defendant restaurant. The dissenting judge argued that the question of consumer expectation should have gone to the jury. The dissent correctly criticized the court's reliance upon *Courter v. Dilbert Brothers, Inc.*,[69] pointing out that the plaintiff in *Courter*, injured by a piece of a prune pit from a jar of prune butter, did in fact recover damages from the retailer for breach of implied warranty. Another New York appellate court recently decided to ignore the *Woods* decision, and adopted the expectation test instead, in *Stark v. Chock Full O'Nuts*.[70] In *Stark*, the plaintiff established a prima facie case that injury had resulted from a walnut shell in the defendant's "nutted cheese" sandwich. Because the defendant chose not to contradict the plaintiff's testimony, the trial court entered a directed verdict for the *plaintiff*. The appellate court affirmed, declaring that

> this tribunal now adopts the "reasonable expectation" doctrine. Under this doctrine, a plaintiff can recover for breach of implied

[65] *Id.* at 426, 198 N.E.2d at 312.
[66] 243 Ore. 546, 415 P.2d 13 (1966).
[67] *Id.* at 551, 415 P.2d at 15.
[68] 8 UCC REP. SERV. 192 (N.Y. App. Div., Oct. 15, 1970).
[69] 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. 1958).
[70] 77 Misc. 2d 553, 356 N.Y.S.2d 403 (Sup. Ct. 1974).

warranty of fitness (UCC § 2-315) if it is found that the natural substance was not to be reasonably anticipated to be in the food, *as served*.[71]

Oklahoma only recently joined the ranks of those states adopting the "reasonable expectation" test in a 1974 decision, *Williams v. Braum Ice Cream Stores, Inc.*,[72] which held that whether the plaintiff could have reasonably expected to find a cherry seed or pit in cherry-pecan ice cream presented a jury question. The federal district court in *Matthews v. Campbell Soup Co.*,[73] applying Texas law in a diversity suit, determined that the reasonable expectation test would be the applicable standard in Texas as well,[74] and reserved the issue of consumer expectation for the jury.

IV. POLICY CONSIDERATIONS

All courts recognize that food processors owe a general duty to the consuming public to exercise due care in the preparation and output of their products.[75] Few courts today could justify a rule shielding a food processor from liability for a breach of that duty when the product involved contains a sharp piece of wire, glass, or other foreign object causing serious injury to a consumer. Yet the case law embodying the foreign-natural test categorically immunizes the same processor from liability when the injury is caused by a sharp bone fragment, a hard fruit pit, or a piece of nut shell, simply because the defect is a natural element of an ingredient in the product. Certainly teeth can be broken and internal tissues lacerated as easily by bone fragments and nut shells as they can be by ground glass and stones.

Why, then, if injurious natural objects are no less a health hazard than injurious foreign objects, have some courts fashioned a rule insulating food processors and sellers from liability for the inclusion of the former in their products? The answer often given is that the processor cannot practicably remove all bones, seeds, and other natu-

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[71] *Id.* at 554, 356 N.Y.S.2d at 404 (emphasis added). The dissenting judge agreed that the expectation test was the applicable test in New York, but maintained that the court, in its "[z]eal to more firmly establish, in this jurisdiction, the correct rule of the so-called 'reasonable expectation test,'" had improperly affirmed the directed verdict for the plaintiff instead of requiring the trial court to submit the case to the jury. *Id.* at 556, 356 N.Y.S.2d at 406.

[72] 534 P.2d 700 (Okla. App. 1974), *writ denied*, 46 OKLA. BAR ASSN. J. 557, 16 UCC REP. SERV. 627 (1975).

[73] 380 F. Supp. 1061 (S.D. Tex. 1974) (oyster pearl in can of oyster soup).

[74] The court remarked that "the 'reasonable expectation' approach is considerably more compatible and consistent with Section 402A [RESTATEMENT (SECOND) OF TORTS] which has been adopted as the law of Texas in product liability cases." *Id.* at 1065.

[75] *See, e.g.*, cases cited note 7 *supra*.

ral defects from its products, and that for this reason it is unfair to expect a "perfect" product.[76] But a manufacturer is in fact expected to produce a "perfect" product to the extent that the product must be free of any injurious *foreign* objects. It seems illogical to say that a processor should take precautions to protect the public from deleterious foreign objects in its products, but that it need not be as concerned about removing bone or shell fragments even when it is practicable to do so. To apply a strict foreign-natural test of liability has precisely that effect, significantly lowering the standard of ordinary care owed to the consumer.

As we have seen, some states have occasionally attempted to avoid the unfairness of the naturalness doctrine without forsaking it entirely by focusing the inquiry upon the style of the food product as sold or served. In other words, liability has been imposed when the injurious substance was "foreign" to the food as sold in its processed state, even though the substance was not "foreign" to all of the ingredients of the product.[77] These cases have tended only to obfuscate the problem. Recall, for example, *Zabner v. Howard Johnson's, Inc.*,[78] the Florida case discussed earlier in which the plaintiff recovered damages after biting into a walnut shell in the defendant's maple walnut ice cream. There the court explicitly adopted the reasonable expectation test. One concurring judge who did not disagree with the majority's rejection of the foreign-natural test nevertheless implied that the court could have reached the same result by a different interpretation of the test:

> The difficulty with the foreign-natural test lies not in its theory but in its artificial application. It seems to me that what is natural to a substance is what is reasonably expected to be found therein. Only by a strained construction of the term can a shell be considered natural to ice cream. The foreign-natural test is too often applied at a preliminary stage of production and with reference to a single ingredient rather than to the final consumer product. By moving the focus of the test to the consumable item the foreign-natural distinction as measured by the consumer's reasonable expectations becomes a valid and relevant standard.[79]

But at what stage of production, as the concurring judge in *Zabner*

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[76] *See* Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421, *writ denied*, 248 La. 468, 179 So. 2d 641 (1965).

[77] *E.g.*, Lore v. DeSimone Bros., 12 Misc. 2d 174, 172 N.Y.S.2d 829 (Sup. Ct. 1958) (bone in processed sausage).

[78] 201 So. 2d 824 (Fla. 1967). *See* text accompanying note 60 *supra*.

[79] *Id.* at 828 (Andrews, J., concurring).

phrases it, does a walnut shell cease to be a natural defect and begin to acquire the characteristics of a foreign defect? Although it is preferable to a strict application of the foreign-natural test because it employs an *element* of expectation, the above view diverts the analysis from the true determinative factor to be ascertained in each case—the customary expectations of consumers.

It is not surprising therefore that several courts recently have abandoned the foreign-natural terminology altogether in favor of the reasonable expectation rationale.[80] These courts have recognized that not all natural defects are reasonably anticipated, and that the condition or form in which the product is sold may be more important in determining consumer expectations than the mere naturalness of the defect. A consumer might reasonably expect to find T-bones in T-bone steaks, fish bones in whole baked trout, chicken bones in fried chicken, and pits or seeds in fresh fruit. For these ordinarily expected defects, of course, a food processor should not be subject to civil liability. A court might even find that the question of consumer expectation with regard to such defects is so indisputable that a directed verdict for the defendant processor or seller would be justified. However, a consumer ordinarily might not expect to find bones in canned ravioli, bones in canned chicken chow mein, walnut shells in walnut ice cream, or pits in cherry preserves. For a plaintiff to be denied compensatory damages for injuries received from these natural but unanticipated defects, simply because of an arbitrary foreign-natural distinction, is now being recognized by several courts as a harsh and unjust result.

Perhaps an explanation for the courts' recent abandonment of the foreign-natural test can be found in a growing sentiment of consumerism, or at least in an awareness that "the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it."[81] That attitude has also led to a greater interest in the imposition of liability without regard to fault, especially in the area of food products liability. Under the strict liability doctrine as formulated in the Second Restatement of Torts,[82] the

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[80] *E.g.*, cases cited note 35 *supra*.

[81] RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

[82] RESTATEMENT (SECOND) OF TORTS § 402A provides as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

seller of an injurious product may be held strictly liable in tort if the product is both defective and "unreasonably dangerous."[83] It is not surprising, therefore, that the reasonable expectation test in food liability cases has become popular only since the emergence of the strict liability concept in the early 1960's, for the reasonable expectation test is clearly compatible with the "unreasonably dangerous" requirement.[84] The Restatement itself maintains that the defective product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[85] On that basis, if courts continue to move in the direction of strict liability as they have in the past two decades,[86] it is probable that the reasonable expectation test will become firmly established as the general rule.

VI. CONCLUSION

In the past fifteen years, courts in several jurisdictions have rejected the foreign-natural test in food products liability cases in favor of a consumer expectation test.[87] No longer is a plaintiff in these jurisdictions categorically denied a civil remedy for injuries resulting from the consumption of unanticipated natural defects in foods. No longer is a food processor or seller in these jurisdictions arbitrarily shielded from liability for the inclusion of deleterious natural substances in its products.

The principal objection to the reasonable expectation test is that it imposes too heavy a burden upon processors and sellers, requiring them to become virtual insurers of their products.[88] A food processor, although not an insurer, does have a "duty of ordinary care to eliminate or remove in the preparation of the food he serves [or sells] such harmful substances as the consumer of the food, as served, would not ordinarily anticipate and guard against."[89] With the prevalence of

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(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[83] Rheingold, *supra* note 34, at 589-90.

[84] *See* Matthews v. Campbell Soup Co., 380 F. Supp. 1061 (S.D. Tex. 1974).

[85] RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).

[86] *See* 63 AM. JUR. 2d *Products Liability* §§ 123-50 (1972).

[87] *E.g.*, cases cited note 35 *supra*.

[88] Some writers have expressed the view that manufacturers and sellers *should* be considered insurers of their products, an idea often advanced in support of the strict liability concept. "Such a liability provides a kind of consumer insurance whereby the aggregate of people consuming the particular product, by paying slightly higher prices, share the financial burdens caused by defective food products." R. DICKERSON, *supra* note 23, at 135 (footnote omitted). In effect, strict liability provides a means for spreading the cost of risk or loss among consumers as a class.

[89] Zabner v. Howard Johnson's, Inc., 201 So. 2d 824, 827 (Fla. 1967).

processed foods on the market today and the development of technology in the food industry, consumers increasingly rely upon food processors to inspect and purify the foods they consume. Many products today are even packaged in such a manner that inspection by the consumer is difficult if not impossible. One might imagine a consumer in a jurisdiction that applies the foreign-natural test tearing away the crust from a beef pot pie to search for tiny bones, or picking apart a cherry-nut ice cream cone to remove stray shells or pits.

In an era of consumerism, the foreign-natural standard is an anachronism. It flatly and unjustifiably protects food processors and sellers from liability even when the technology may be readily available to remove injurious natural objects from foods. The consumer expectation test, on the other hand, imposes no greater burden upon processors or sellers than to guarantee that their food products meet the standards of safety that consumers customarily and reasonably have come to expect from the food industry.

As indicated previously, the test of liability in Ohio remains unclear.[90] The sole pronouncement on the subject by the Supreme Court of Ohio raised as many questions as it answered, but it is evident that the court did not perceive much value in the foreign-natural test alone. Whether the court intended to adopt wholeheartedly the consumer expectation approach, and whether the expectation question will ordinarily be submitted to the jury in Ohio remains to be determined.

Charles Robert Janes

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[90] *See* text accompanying notes 38-54 *supra*.